THE HON'BLE MR JUSTICE B. SUDERSHAN REDDY

and

THE HON'BLE MR JUSTICE S.ANANDA REDDY

W.P.NO.17663 & 17664 OF 2005

WRIT PETITION NO : 17663 of 2005

Dated 29.11.2005

Between:

M/s. Sujana Metal Products Limited Rep.by its Director, Sri S.Hanumantha Rao
R/o. No.18, Nagarjuna Hills Panjagutta
Hyderabad.

..... PETITIONER

AND

State of Andhra Pradesh Rep. by its Principal Secretary, Revenue Department, Secretariat Hyderabad, A.P and others

.....RESPONDENT(S)

THE HON'BLE MR JUSTICE B. SUDERSHAN REDDY

and

THE HON'BLE MR JUSTICE S.ANANDA REDDY

W.P.NO.17663 & 17664 OF 2005

COMMON ORDER:

The petitioners-companies are engaged in the manufacturing and also in trading of iron and steel. They are the assessees on the file of the 2nd respondent herein. For the assessment year 2002-03, the petitioners filed A2 returns reporting the gross and net turnovers claiming exemption on a turnover of specified amounts as second sales. Their business premises was inspected by the 2nd respondent on 1.11.2002 and on verification of the records, a show cause notice dated 3.3.2003 was issued proposing to disallow exemption on the second sales turn over of Rs.76.50 crores in W.P.No.17663 of 2005 and of Rs.115.52 crores in W.P.No.17664 of 2005. The petitioners submitted their detailed replies on 18.5.2003 and 19.5.2003 and the 2nd respondent having considered the replies submitted by the petitioners, passed the impugned provisional orders of assessment dated 6.8.2003. The 2nd respondent determined the tax liability of the petitioner in W.P.No.17663 of 2005 at Rs.3,55,03,413/- and at Rs.4,62,08,770/- in W.P.No.17664 of 2005.

The orders were duly served upon the petitioners on 14.8.2003 together with demand notice, calling upon the petitioners to pay the said amount of tax within 30 days from the date of service of notice. The petitioners were duly put on notice that failure to comply with the demand shall result in coercive measures to recover the tax due.

Being aggrieved by the impugned orders passed by the 2nd respondent, the petitioners filed appeals under Section 19(1) of the A.P. General Sales Tax Act, 1957 (for short 'the Act') before the 3rd respondent inter alia contending that the determination of taxable turn over and levy of tax there on is incorrect, baseless and untenable. The 3rd respondent vide proceedings dated 15.9.2003 having scrutinized

the appeals preferred by the petitioners on 13.9.2003 found that the appeals have been presented without payment of 12.5% of the disputed tax, as is required under the second proviso to Section 19(1) of the Act and accordingly directed the petitioners to make good the lapse within seven days from the date of receipt of the check memo. The petitioners were accordingly put on notice that their appeals were liable to be rejected in case of failure to comply with the requirement of depositing 12.5% of the disputed tax under the second proviso to Section 19(1) of the Act.

The petitioners, instead of complying with the requirement, have chosen to file Writ Petition Nos.25465 and 25466 of 2003 with a prayer to declare the second proviso to Section 19(1) of the Act as illegal and to struck down the same. The said writ petitions were admitted but no interim orders have been passed.

The 3rd respondent, vide the orders dated 27.11.2003, having considered the further representation made by the petitioners on 9.10.2003, rejected the appeals preferred by the petitioners as "not maintainable for failure to fulfil the conditions prescribed under the second proviso to Section 19(1) of the Andhra Pradesh General Sales Tax Act." The said orders are also impugned by way of separate miscellaneous applications filed in W.P.Nos.25465 and 25466 of 2003. The petitioners however did not press for grant of any relief in the said miscellaneous applications and the writ petitions themselves were taken up for hearing. We have dismissed the writ petitions vide our orders dated 15.11.2005.

The respondent authorities issued orders in Form 5 invoking the provisions under the A.P. Revenue Recovery Act for realization and recovery of the tax due under the impugned assessment orders. The properties belonging to the petitioners - companies were accordingly attached.

That it is after the initiation of the proceedings under the provisions of the Revenue Recovery Act for recovery of the tax due from the petitioners, the present writ

petitions have been filed challenging the orders of assessment dated 6.8.2003 on various grounds.

In the affidavits, which are similar, the petitioners state that in their declarations in A2 returns, the details of purchases as well as sales were furnished and the assessing authority elected to accept the sales but disallowed the purchases. According to them, the respondents are estopped from accepting the sales of the dealers from whom they purchased while rejecting the purchases made by them. It is stated that the 2nd respondent having accepted that the investigation by the department also revealed that the purchases claimed by the dealers are fictitious, ought not to have proceeded to tax the sales turn over by disallowing the claim of the petitioners for grant of exemption. Shorn of all the details, the case set up by them is that the transactions are nominal in their nature without there being

any transfer of goods and hence no tax can be imposed by the department. It is submitted that the purchases made by the petitioners from a number of registered dealers were already assessed by the respective assessing authorities and all such sales by the suppliers are nothing but the purchases of the petitioners. The case set up by them is, when the sales at the hands of the suppliers were assessed, it is not correct on the part of the 2nd respondent in disbelieving the said purchases by the petitioners and consequently the sales effected by them. Those sales are required to be considered as second sales on which no tax is liable to be paid inlaw. The sales at the petitioners' hands cannot be considered as liable to tax at the hands of the petitioners. There cannot be a sale without a corresponding purchase of goods. The petitioners purchased the goods from the registered dealers within the state of Andhra Pradesh and sold to dealers within Andhra Pradesh. It is their case that when the sales at the hands of the suppliers made to the petitioner tally with the purchases made by the petitioners from the said suppliers, the said sales by the petitioners are to be recorded as second sales eligible for grant of exemption, since

the suppliers who made sales to the petitioner are registered dealers within the state of Andhra Pradesh and all such sales were already assessed by the respondents and assessment orders were accordingly passed levying tax.

Sri S.R.Ashok, learned senior counsel strenuously contended that the impugned provisional assessment orders for the years
2002-03 suffer from incurable legal infirmities. The authority passed orders mechanically without application of any mind. None of the objections raised and the contentions urged were taken into consideration by the assessing authority. The orders are violative of principles of natural justice. The learned senior counsel submitted that the impugned orders are liable to be set aside and the matter be sent back for fresh consideration by the authority in accordance with law as the errors committed by the assessing authority are clearly apparent on the face of the record.

Sri K.Raji Reddy, learned special standing counsel submitted that the writ petitions are misconceived and not maintainable in law. The conduct of the petitioners dis-entitles them to seek any remedy under Article 226 of the Constitution of India. The discretionary remedy available under Article 226 of the Constitution of India is not available to the petitioners. The learned standing counsel further submitted that the petitioners, having availed the remedy of appeal as provided for under the provisions of the Act, cannot be permitted to pursue parallel remedy by filing the present writ petitions.

The questions that fall for our consideration is whether these writ petitions are maintainable? Whether the petitioners are entitled to the discretionary relief under Article 226 of the Constitution of India.?

The relevant facts, which are not in dispute may briefly be summarized. The petitioners filed appeals on 13.9.2003 challenging the very assessment orders dated 6.8.2003, which are impugned in these writ petitions. The 3rd respondent vide

proceedings dated 15.9.2003 while pointing out the defects, required the petitioners to deposit amounts equivalent to 12.5% of the disputed tax as is required under the second proviso to Section 19(1) of the Act. The 3rd respondent clearly put the petitioners on notice that in the absence of such payment, the appeals preferred by them cannot be entertained for their disposal on merits. The petitioners filed writ petitions to declare the second proviso to Section 19(1) of the Act which requires the dealer to produce proof of payment of 12.5% of the difference of tax assessed by the assessing authority and the tax admitted, for the relevant assessment year in respect of which the appeals are preferred. This Court having admitted the writ petitions did not pass any interim orders. Thereafter, the 3rd respondent vide the orders dated 27.11.2003 rejected the appeals which were impugned by way of separate miscellaneous applications. This Court vide its orders dated 15.11.2003 dismissed the writ petitions as well as the miscellaneous applications. The order passed by the 3rd respondent refusing to admit the appeals preferred by the petitioners, since the petitioners did not produce the proof of payment of 12.5% of the difference of the tax assessed and the tax admitted in respect of which the appeals were preferred, attained finality. The appeals preferred by the petitioners accordingly stood dismissed on whatever grounds.

The question that arises for our consideration is whether the petitioners could be permitted to challenge the very orders of assessment in respect of which appeals have been preferred by them. The contention of the learned senior counsel is that the alternative remedy of appeal is not an efficacious one as it requires compliance with the onerous condition of pre-deposit of the specified amounts along with the appeal. The remedy, according to the learned senior counsel, is an illusionary one.

It is true that the existence of a statutory remedy may not effect the jurisdiction of this Court to issue a writ but the existence of an adequate legal remedy is one of the

important factor that is required to be taken into consideration by this Court while exercising its jurisdiction under Article 226 of the Constitution of India and where such a remedy exists, it will be a sound exercise of discretion to refuse to issue a writ. In ***British India Steam Navigation Co. v. Jasjit Singh*** the Supreme Court observed that the High Courts should be slow in encouraging parties " *to circumvent the special provisions made providing for appeals and revisions in respect of orders which they seek to challenge by writ petition under Article 226."*

In ***Assistant Collector of Central Excise v. Dunlop India Limited ,*** the Supreme Court observed:

> "*It has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Art.226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or whether private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then, the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters." (emphasis is of ours)*

In ***SALES TAX OFFICER Vs. SHIV RATAN G.MOHATTA*** the Supreme Court decried the practice and tendency on the part of the assessees to rush to the High Court after an assessment order is made and administered caution that the High Court's should not encourage such practice. It is observed that the High Courts may entertain the petitions under Article 226 of the Constitution in respect of taxing matters, after an assessment order has been made, only in very exceptional circumstances. The Court further observed:

> "*It was not the object of Article 226 to convert High Courts into original or appellate assessing authorities whenever an*

> *assessee chose to attack an assessment order on the ground that a sale was made in the course of import and therefore exempt from tax. It was urged on behalf of the assessee that they would have had to deposit sales tax while filing an appeal. Even if this is so, does this mean that in every case in which the assessee has to deposit sales tax, he can bypass the remedies provided by the Sales Tax Act? Surely not. There must be something more in a case to warrant the entertainment of a petition under Art.226, something going to the root of the jurisdiction of the Sales Tax Officer something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act." (emphasis is of ours).*

The case on hand, in our considered opinion, does not fall under any exceptional circumstance where this Court could grant relief under Article 226 of the Constitution to a party even though an equally efficacious remedy is available under the statute. One such exception was pointed out to be where action is being taken under an invalid law arbitrarily without the sanction of law. Another exception is when allegation of infringement of fundamental rights is made. The issue is not one of jurisdiction but exercise of it. This Court undoubtedly has jurisdiction to decide whether the impugned order has been passed in accordance with law. It is not as if that the High Court will never entertain a petition against an order of taxing officer but it normally does not exercise its jurisdiction by entertaining petitions against the orders of taxing authorities, when the statute under which the tax is sought to be levied, provided a remedy by way of an appeal or other proceedings to the party aggrieved.

In our considered opinion, if a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for this Court to entertain the writ petition. The rule is based on public policy. It is so well settled that if a party is actively pursuing an alternative remedy, the relief under Article 226 must be refused as the parties cannot be allowed to pursue two parallel proceedings. The petitioners, in the instant case have availed the remedy of appeal

but did not pay the required amount along with the presentation of the appeal as is required in law. The submission that the petitioners could not comply with the onerous condition and the right of appeal becomes in such a case illusionary is not acceptable. The right of preferring appeal cannot be said to have been whittled down because of the requirement of making pre-deposit of specified amounts as provided for under the very law under which the right of appeal has been provided. Article 226 of the Constitution of India is not meant to short-circuit or circumvent the statutory procedures.

For all the aforesaid reasons, we are not inclined to exercise our jurisdiction under Article 226 of the Constitution and review the impugned provisional orders of assessment on merits. In that view of the matter, we are not inclined to consider the submissions and refer the judgments cited at the Bar.

The writ petitions are accordingly dismissed without any orders as to costs.

(B.SUDERSHAN REDDY,J)

dated 29.11.2005

(S.ANANDA REDDY,J)

msv.